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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON PROHIBITION OF EXTREMIST ORGANISATIONS AND UNIONS IN GEORGIA

Adopted by the Venice Commission
at its 55th Plenary Session
(Venice, 13-14 June 2003)

on the basis of comments by

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I. Introduction

1. The Venice Commission was invited by the Georgian authorities to comment on the draft law 'on prohibition of extremist organisation and unions in Georgia (CDL (2003) 36). The stated purpose of the draft law is to prohibit the use of force in Georgia for political purposes, to protect the constitutional order from "coup d'état" or forceful change "as well as prevention of other manifestations of extremism". This draft law is stated to be in accordance with Article 26 of the Georgian Constitution, which provides for rights for individuals to form and join associations and political parties in accordance with law.

2. The text of the draft was provided by the Council of Europe's office in Tbilissi. According to information received by the Rapporteurs of the Venice Commission and the Secretariat, there were several drafts of this law. The examined version was the draft by the Georgian Ministry of State Security. The translation provided, done in Tbilissi, was poor and sometimes ambiguous. The draft law, distributed in the press on 19 February 2003, was described as a working draft aimed at filling the gaps in Georgian legislation in order to curb extremism, including militancy by extreme religious groups. The present opinion was adopted by the Venice Commission at its 55th Plenary Session (Venice, 14-15 June 2003).

II. General provisions of the draft: Articles 1 - 4.

3. This law is stated to be in accordance with Article 26 of the Georgian Constitution, which provides for rights for individuals to form and join associations and political parties in accordance with law. Article 1 prohibits such associations or political parties whose aims include subversion of the State or attempts to create "ethnic, racial, social or national unrest". Prohibition of public and political organisations is only possible by court order. Article 2 states that the "law defines grounds and rules of prohibition of organisations and political unions".

4. Article 3 of the draft law defines and draws a distinction between '*an organisation*' and '*a political union*'. An '*organisation*' appears to comprehend all organisations or combinations of persons, of whatever number and for whatever purpose, whether officially registered or not, whether structured or unstructured, other than political parties. There is no requirement that an organisation be established for any particular period of time to be covered by the definition. '*Organisation*' includes 'religious' unions and 'commercial organisations'. A '*political union*', which is separately defined, includes a political party within the meaning of the law on Political Unions of Citizens, as well as other unions of citizens which may not be legally registered as political parties but whose activities are political.

5. The provisions of the draft organic law are basically written in a two-step pattern: Article 3 defines certain activities as extremist and article 4.1 declares any such activity impermissible in Georgia. The wording of both provisions is very broad.

6. Article 3.d[1], for example, defines "*extremist activities (extremism)".* The definition is comprehensive and complex; not only activities of an organisation or a political union are included in it

– *"... aimed at obliterating or forcefully changing the constitutional order or the government of Georgia ..."*

but also

– *"creating illegal military groups;"*
– *"conducting terrorist, including international terrorist, activities;"*
– *"propagating war or violence, or facilitating national, regional, religious or social enmity;"* and
– *"perpetrating acts of hooliganism and vandalism ... with motive of ideological, political, racial, ethnical [national], religious abhorrence or hatred towards any social group"*.
In addition, in Articles 3.d[2] and 3.d[3] the definition also includes
– *"public call for implementation or conduction of such activities, as well as distribution of extremist literature;"* and
– *"financing of such activities or any other support to their implementation"*.

As can be seen from the above, this definition includes activities which are very heterogeneous; some of them are essentially and typically political, while others are not. No distinction is made between generally criminal activities and other activities, which basically may be considered political and therefore be met by means of political dialogue but which because of violence, etc. are no longer acceptable and justifiable and therefore may have to be penalised.

7. The absence of such a distinction risks creating a problem in the light of the principle of proportionality, since the margin of appreciation of a State is different in cases mentioned above. It can be linked to three main points:
- precise definition of restrictions;
- necessity in a democratic society;
- proportionality.

These aspects will be examined further in paragraphs concerning requirements of the European Convention on Human Rights.

Further, it should be observed that in the English language the adjective *"extremist"* and the noun *"extremism"* both are bearers of connotations which would make it unsuitable to use either adjective or noun in English legal texts. If the corresponding terms in the Georgian text of the draft are bearers of similar connotations, the use of other terms should be considered.

8. Article 4 makes '*extremist activities…impermissible in Georgia"* whether carried out by an '*organisation'* or a '*political union'*. If either an organisation or a political union conducts 'extremist activities' it can be declared to be '*an extremist union'* by the Supreme Court or the Constitutional Court. The draft law applies to an extremist union a range of consequences including liquidation, prohibition of all activities and forfeiture of its property to the state.

III. Application of the European Convention on Human Rights and international practice in this field.

A. Application of the European Convention to extremist organisations and unions in general.

9. When it comes to essentially and typically political activities any legislation to penalise those activities which are not acceptable and justifiable in a democratic society has to be drafted with regard to human rights protection in this field. Freedom of association, freedom of opinion and other fundamental freedoms and human rights as enshrined in human rights' documents have to be respected.

10. Article 5 of the draft law establishes a set of rules on warning of an organisation or a political union about "impermissibility of conduction of extremist activities". Article 6 sets procedures for a prohibition of an organisation or a political union that failed to rectify their activity following a warning as established in Article 5.

12. Article 1 of the European Convention on Human Rights requires that the contracting parties secure everyone subject to their jurisdiction the rights set out in the Convention and in the protocols where ratified. Care must therefore be taken by governments and legislatures to ensure that laws of their states contain only legitimate restrictions on fundamental freedoms and that implementation of those laws do not impose burdens or restrictions on or harm other legitimate interests which are disproportionate to the objects to be achieved by the restrictions. Therefore, restrictions should be narrowly interpreted and applied, and the need for those restrictions convincingly established. As a Party to the Convention, Georgia must abide by this requirement for legitimacy and proportionality.

13. Both the European Convention and the Georgian Constitution guarantee freedom of association[1] and freedom of expression[2]. However, this draft law seeks to impose on all Georgian organisations significant restrictions on the freedom of association primarily and, through these restrictions, on the freedom of expression. Freedom of association is regarded as fundamental to the democratic process and is closely related to freedom of political expression, which secures the right of the citizen to be involved in the political process. The protection of opinions and freedom to express them is one of the objectives of the freedoms of assembly and association in Article 11. Freedom of expression constitutes one of the foundations of a democratic society and effective advocacy of political views requires organisation and freedom of association. Freedom of association and expression are also fundamental to the operation of trade unions and also the promotion of other economic, social and cultural rights. Restrictions on these rights will necessarily be contentious and therefore require a clear justification and narrow application.

14. Article 11 of the Convention is not the only provision which is relevant in this context. In its case law the European Court of Human Rights has repeatedly stated that Article 11, notwithstanding its autonomous rule and particular sphere of application, also must be considered in the light of Article 10 of the Convention, which guarantees freedom of expression. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies, according to the Court, all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy. The Court has pointed out that there can be no democracy without pluralism, and that it is for that reason that freedom of expression, as enshrined in Article 10 of the Convention, is applicable, subject to paragraph 2 of Article 10, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. According to the Court, inasmuch as the activities of political parties form part of a collective exercise of the freedom of

[1] *Article 11 ECHR and Article 26 Georgian Constitution*

[2] *Article 10 ECHR and Article 24 Georgian Constitution*

expression, political parties are entitled to seek the protection of Article 10 of the Convention.[3] The Court has also both found and reiterated that it is the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a state is currently organised, provided that they do not harm democracy itself.[4] When it comes to placing restrictions on a political party or dissolving it as "necessary in a democratic society" it must therefore be considered whether the measure – be it restriction or dissolution – would meet a "pressing social need" and be "proportionate to the legitimate aim pursued".[5] The Court has taken the view that a political party may campaign for a change in the law or the legal and constitutional basis of the state on two conditions:

(1) the means used to that end must in every respect be legal and democratic;
(2) the change proposed must itself be compatible with fundamental principles.

But the Court has also found that it necessarily follows that a political party whose leaders incite violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds.[6]

16. Finally, it has to be recalled that Article 17 of the Convention provides that nothing in the Convention *"may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."*

B. Provisions of the Draft law concerning international co-operation in the field of fight against extremism (Article 7 of the draft).

17. The draft law tries to make reference to the international co-operation aimed at fighting extremism. In the context of the draft, the term 'extremism' seems too broad. If Article 7 is intended to fight international terrorism, it can be recalled that the *Committee of Ministers* [of the Council of Europe] at its 804th meeting on 11 July 2002 adopted "Guidelines on human rights and the fight against terrorism". According to Section II of these guidelines, "all measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, and must be subject to appropriate supervision". In addition, Section III.2 of the guidelines states that, "when a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued".

18. When considering the issue of 'organisations and political unions of foreign States', Georgian authorities might consider more precise definitions and the close connection between the organisation and its subversive or terrorist aims that are made in various international instruments which have dealt with the difficult area of international terrorism. For example, see

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[3] *Case of Freedom and Democracy Party (ÖZDEP) v. Turkey, judgment 08.12.1999, § 37. Case of Refah Partisi (Welfare Party) and others v. Turkey, judgment (Grand Chamber) of 13.02.2003, § 89 (cf. judgment (Third Section) of 31.07.2001, § 44).*

[4] *Case of Freedom and Democracy Party (ÖZDEP) v. Turkey, judgment of 08.12.1999, § 41.*

[5] *Case of Freedom and Democracy Party (ÖZDEP) v. Turkey, judgment of 08.12.1999, § 42.*

[6] *Case of Refah Partisi (Welfare Party) and others v. Turkey, judgment (Grand Chamber) of 13.02.2003, § 98(cf. judgment (Third Section) of 31.07.2001, § 47).*

the definition of "terrorist group" set out in the EU Council Framework Decision of 13th June 2002 on combating terrorism. The formulation of words used in Article 2 is:

"For the purposes of this Framework Decision, "terrorist group" shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity for its membership or a developed structure".

19. A list of '*intentional acts',* where committed with specified terrorist aims, is set out in Article 1 of the Framework Decision. The Preamble to the Framework Decision states that the EU endeavoured to draft the Framework Decision in a way that respected fundamental rights and freedoms though to date it has not been the subject of any judicial decision. The European Convention on Human Rights has been given indirect effect through incorporation into EC and EU norms[7].

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20. Only convincing and compelling reasons can justify restrictions on parties' or organisations' freedom of association. The European Court of Human Rights' case law on this topic is reflected in the "Guidelines on Prohibition and Dissolution of Political parties" adopted by the Venice Commission – CDL-INF (2000) 1. These, *inter alia,* require that states recognise that everyone has the right to associate freely in political parties. Limitations on the exercise of the right to associate freely in political parties and to hold political opinions must be consistent with the European Convention on Human Rights.[8] In particular, paragraph 3 of the Guidelines provides that '*prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution.'* The Georgian draft law does not give such a clear and precise definition. To take an example from the text of the draft law, it is not clear whether the phrase in Article 3.d, "obliterating…the constitutional order or the government of Georgia", is intended to connote only violent activity. Reference is made again to the remarks at paragraph 7 above on the unsuitability of the words "extremism" and "extremist".

21. In order for a restriction on the guaranteed freedoms to be justified in accordance with article 11(2) or 10(2), the European Court of Human Rights require the state to show that the interference:

a) is prescribed by law and, in particular, that it is formulated with sufficient precision to enable persons likely to be affected by it of their rights to understand the circumstances in which any such restriction may be imposed and on the other hand, to enable such persons to foresee with a reasonable degree of accuracy the consequences of their actions[9];

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[7] *Article 6 Treaty on European Union*

[8] *Case of Refah Partisi (Welfare Party) and others v. Turkey, judgment of 31.07.2001.*

[9] *Case of Sunday Times v United Kingdom, judgement of 26.04.1979 (2EHRR 245)*

b) must pursue a legitimate aim in accordance with Article 11(2) ie its objective must be:
   a. the prevention of disorder and crime
   b. the protection of health or morals or
   c. the protection of the rights and freedoms of others.
c) must be necessary in a democratic society.

22. A certain margin of appreciation is granted to contracting states in imposing restriction on qualified rights. However this is not unlimited, and the European Court will ultimately decide whether the restriction is compatible with the European Convention. The phrase means that in order to be compatible the interference must be in response to a 'pressing social need' and must be 'proportionate to the legitimate aim pursued'. In assessing the proportionality of the interference the Court will ask, *inter alia*, whether there was a less restrictive alternative capable of meeting the same aim[10], whether safeguards are in place to prevent abuse[11] and whether the restriction in question destroys the 'very essence' of the Convention right in issue[12]. So, for instance, if it is the case that any definition of '*extremist activity'* would result in the restriction of non-violent political dialogue or protest with the aim of constitutional change, this would not be necessary in a democratic society and would violate fundamental rights and freedoms as they are enshrined in the national Constitution (see par.13 of this text) and in the European Convention. It needs to be examined, for example, whether an organisation, when some of its members are involved in an isolated incident of 'hooliganism' or 'vandalism', should be prohibited pursuant to the draft law or otherwise dealt with pursuant to the ordinary criminal law.

IV. Judicial review and the provisions of the draft.

23. In order to be in compliance with, the European Convention as interpreted by the European Court of Human Rights, with the Guidelines of the Committee of Ministers and those of the Venice Commission, any legislation concerning restrictions on activities of political parties would have to pass the tests and meet the requirements which the Court has specified. However, it is not obvious that the provisions of the proposed organic law would do that. The wording of the draft is very broad. Indeed, the draft is so broadly written, that the provisions of the organic law would be applicable not only to activities which would be unjustifiable and unacceptable under Articles 10 and 11 of the European Convention and the Guidelines, but also to activities which are both justifiable and acceptable in an open and pluralistic democracy.

24. As to *procedural requirements,* the Venice Commission in its above mentioned guidelines, has expressed the view that cases concerning prohibition or dissolution of a political party should be decided by the Constitutional Court or other appropriate judicial body and that the procedure should offer all guarantees of due process, openness and a fair trial. The first requirement – decision by the Constitutional Court or by the Supreme Court – is met by articles 6.1 and 6.2 of the proposed organic law but it is not clear whether the proposed law is in compliance with the second requirement – a procedure that offers all guarantees of due process,

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[10] *See Informationsveerin Lentier v Austria (1993) 17 EHRR 93*

[11] *Case of Klass v Germany, judgement of 06.09.1978 (2 EHRR 214)*

[11] *Case of Rees v UK, judgement of 17.10.1986 (9 EHRR 56)*

openness and a fair trial. This second requirement would clearly not be met, if it were intended that only the proposed organic law would be guiding court procedures. The situation may be different if the intention is to make general rules of procedure before the two Courts applicable to procedures concerning requests under the proposed organic law. If the latter is the case, it should be stated clearly, either by a reference in the text of the proposed organic law to the applicable general rules of procedure or by some other clarifying legislation.

25. According to article 6.3 of the proposed organic law it would be the *Georgian Security Service* which would have to make a *request* to the Constitutional Court or the Supreme Court to initiate proceedings concerning the prohibition of extremist organisations. However, in order to achieve a thorough and comprehensive examination of a possible case at an early stage, the decision to initiate court proceedings aiming at prohibition or dissolution of a *political party* or other political organisation should be made, not by the Security Service, but by a political instance such as, the parliament, the government or a minister. Requests to prohibit or dissolve *other organisations* should be made by the public prosecutor or by an administrative agency, which is independent of the Security Service.

V. Conclusions

26. The draft law examined by the Venice Commission seeks to establish a definition of what could be considered an extremist organisation or union whose activities are impermissible. The draft law provides a number of sanctions against any such organisation or union, including prohibition. Since Georgia is party to the European Convention on Human Rights it must respect the rights guaranteed in the Convention. The law is insufficiently clear in its definition of what can be considered as "extremist activities" and who and what activities are the target of the draft law so as to be "prescribed by law" according to the jurisprudence of the European Court of Human Rights thus giving rise to a risk of abusive control of political parties and unions.

27. The examined text could be applicable not only to activities unacceptable under the Constitution and the European Convention but also has the possibility of applying to activities that are acceptable in a pluralistic democracy. It would be advisable that the draft law be adjusted to comply with Articles 10 and 11 of the European Convention.

28. As to the procedural requirements, additional guarantees should be envisaged with an aim of providing all conditions for access to justice and fair trial.

29. The Venice Commission hopes that the Georgian authorities will consider the recommendations given in the present opinion in their further work on this piece of draft legislation.